No. 22611

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF BREMERTON, A PUBLIC BODY POLITIC AND CORPORATE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

The appellee agrees with the statement of the case set forth on pages 2 and 3 of the appellant's brief, with the following clarification:

1. It is undisputed that the state court action was prosecuted on behalf of an 18-month-old child (legally incapable of contributory negligence), for her general damages only and that the defense of contributory negligence was not, therefore, available. (*Thomas v. Housing Authority of the City of Bremerton*, 71 Wn.2d 67, 426 P.2d 493.

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2. It is further undisputed that two questions of law were submitted to the trial court for decision. The first related to the nature and extent of the remedy of the United States granted under the Medical Care Recovery Act, 42 U.S.C. 2651. The second question is whether the defense of contributory negligence of the parents of the minor child is available as a defense to this action seeking recovery of the fair value of medical services rendered the child. This issue was not involved in the state court action and was specifically not passed upon by the trial court in the instant litigation in view of the District Court's opinion that the United States had failed to comply with the mandatory requirements of the Medical Care Recovery Act (R. 47-48). The parties have stipulated to submit the issues to this court upon the record herein and the District Court's Memorandum Decision of December 5, 1967.

SUMMARY OF ARGUMENT

I

Congress enacted the Medical Care Recovery Act to give the United States a right to recover from third party tort feasors the cost of medical care it furnishes to persons injured under circumstances creating a tort liability. The right did not exist prior to the enactment of the act. The District Court properly construed the effect and purpose of 42 U.S.C. 2651 (b) and, therefore, properly dismissed this action as a matter of law.

II

The fact that appellee, the Housing Authority, concedes that the United States was required by law to furnish the medical care here involved, does not mean that appellee

concedes that the defense of contributory negligence is not available to it in the instant suit. Nothing in the Medical Care Recovery Act purports to change the substantive law of the State of Washington concerning the availability of this defense.

ARGUMENT

I. The District Court Properly Held That the Present Suit Was Barred Because the United States Failed to Intervene in the State Court Action.

The relatively narrow question raised for this Court's determination is whether or not the United States is barred from bringing this action by reason of its failure to intervene in the state court suit, which was brought within six months of the date services were first rendered, and of which the United States had actual knowledge.

The District Court concluded that the United States can bring its own action against the tort-feasor *only* where no suit has been commenced by the injured party within six months after the first day in which care and treatment is furnished by the Government; and that if (as here) such suit is brought by the injured party within six months, the United States *must* intervene if it wishes to assert a claim.

It is acknowledged that in rendering its opinion, the District Court did not have available the Third Circuit Court opinion in *United States v. Merrigan,* 389 F.2d 21 (C.A. 3), nor, that the Government, at the time of writing its appellant brief herein, had available to it the Sixth Circuit Court opinion in *United States v. York* (C.A. 6, No. 18001, filed with the Clerk of Court on July 24, 1968). Each of these opinions reaches a result contrary to the

opinion of the District Court in this action. Consideration of each opinion, therefore, is in order.

The relevant portions of the Medical Care Recovery Act, 42 U.S.C. Sec. 2651 are set forth verbatim on pages 4 and 5 of the appellant's brief. The statute is, unfortunately, ambiguous. To come directly to the point and state the obvious, had the Congress used the word "shall" instead of "may" in the introductory language to Section 2651 (b), there would be no issue between the parties and we believe the Government would acknowledge that its claim was barred by reason of its failure to intervene in the state court action.

The Court in the *Merrigan* decision first considers the problem as to whether or not the Act creates a right in the Government completely independent of the injured person's claim (free from all classical concepts of subrogation).

It concludes that there is no element of subrogation or derivative rights involved. From this premise it then considers the six month provision, grapples with the problem that the plain language of the statute poses, and apparently comes up with no other solution than to hold that "the truth of the matter is that the six month provision is an incongruous residue left in the statute from the earlier intention to provide to the Government no more than a derivative right of subrogation." This, it is respectfully submitted, is a rather strained and peculiar interpretation of clear statutory language.

Appellee contends that if the Act is to have meaning, its individual parts must logically be construed to render the entire wording meaningful. In this sense, the Act cer-

tainly creates a new right in the Government to assert a claim and to enforce the claim in its own name in a separate suit (in some circumstances). Nothing, however, is stated in its language that purports to change the fact that the right is necessarily derivative through the Government's relationship with the injured person.

The effect of the Court's reasoning permitted it to disregard the mandatory requirements of the six month provision and permit recovery by the Government. This amounts to no more nor less than a judicial legislation, specifically prohibited by the United States Supreme Court in *United States v. Standard Oil Co.*, 332 U.S. 301.

A far more logical and reasonable interpretation is placed on the pertinent sections by the trial court wherein it recognizes the right of the United States to bring an independent action but further recognizes that the right granted by the statute is explicitly limited to cases in which the victim has not himself brought suit within the six month period. Thus where the victim has brought such an action, the United States has no explicit authorization from the statute to bring its own action. We agree with the interpretation of Judge Beeks: "If Congress had intended to permit the United States to enforce its right by an independent suit irrespective of whether the victim brought a suit within the six month period, there would have been no need or function for the additional clause which introduces subsection 2651 (b) (2). Had such been Congress's intention, it would have dispensed with the entire clause. Under the familiar rule of statutory construction that the courts must interpret a statute in a manner which gives meaning to all portions thereof, this court

must reject the interpretation urged by the United States." (R. 47).

We further agree with and urge upon this Court the reasoning contained in Judge Hastie's dissent to the *Merrigan* decision, which appeared in the advance sheet publication but not in the Federal Reporter bound volume;

> "As the majority opinion states, the Medical Care Recovery Act, 42 U.S.C. 2651, was enacted to give the United States a statutory right to recover for certain medical services where the Supreme Court had held that such a right could not be created by judicial fiat, *United States v. Standard Oil Co.*, 1947, 332 U.S. 301. However, as I read the legislative text, the Act is so phrased and arranged that, although the government is enabled to recover in specified circumstances, no remedy is provided for the situation presented by the present case. This may reflect poor draftsmanship or inadvertence. But, in my view, the courts have no more authority to supply a remedy in circumstances not specified in the Act than they had to give relief before the statute was enacted. . .
>
> "The majority believe it is fair and sensible to afford the government a remedy by way of a separate action in the present situation even though a private suit was filed promptly and the government failed to intervene. With this conclusion I have no quarrel. *However, Congress specified the remedies it created in a way that excludes an independent action by the United States in this situation. Therefore, I think it is not within judicial competence to grant such a remedy, however desirable that course of action may seem.*"

In construing Section 2651 (b) the Sixth Circuit Court largely echoes the rationale of the *Merrigan* decision relative to the six month provision. The opinion states: "Clause (1) was necessary in order to give the United States an absolute right to intervene, not subject to the discretion

of the trial judge. . . . Clause (2) was required to delay the exercise of the Government's right of action for a reasonable time to give the injured person an opportunity to bring the necessary action if he so desired; and that that was the only limitation on the Government's right to bring an independent action that was intended by Clause (2). Nothing in the legislative history evidenced concern for the tort feasor or for the possibility that the tort feasor might be subjected to multiple litigation." (*United States v. York*, C.A. 6, No. 18001, at page 7). Such interpretation substantially alters the plain meaning of the statutory language and amounts to prohibited judicial legislation.

II. The District Court Did Not Err in Refusing to Hold as a Matter of Law on the Present Record That the United States Was Entitled to a Judgment of $3,275.

The District Court's opinion did not pass upon the question of the availability of the defense of contributory negligence of the parents of the minor child, Carrie Thomas. The Government contends that this defense is not available. Its reasoning, based upon the relevant portion of Section 2651 (a) quoted verbatim on page 16 of appellant's brief, is that the statute creates an independent right of action in the United States. From this premise, the Government asserts that its right to recover is not limited to the third party's right to recover under state law (appellant's brief, page 18). If we understand the Government's contention, it is that no matter how contributorily negligent an injured person might be, the Government would be entitled to collect the reasonable value of the care and services supplied him from a negligent third person, even though the injured party be denied general and other special damages by reason of his own negligence.

We do not concur in this view and find nothing within the Act to support the Government's contention in this regard. In *United States v. Greene,* 266 F.Supp. 976 (U.S.D.C., Ill., 1967) the District Court clearly held that the United States recovery may be barred by substantive defenses such as contributory negligence or lack of negligence.

It is undisputed that in the state court action involving the injuries sustained by the minor child, no claim or contention was made for medical expenses and the parents of the child asserted no claims of their own in that litigation.

It is abundantly clear, under Washington State law, that parents are legally responsible for necessary medical care and expenses rendered their minor children and that minor children may not bring an action to recover such medical expenses without the express consent of the parent. (*Donald v. Ballard,* 34 Wash. 576, 76 Pac. 80). The defense of contributory negligence while not available against a minor child, is available against the parents in their claim for recovery of medical bills. (*Cox v. Hugo,* 52 Wn.2d 815, 324 P.2d 467 (1958)). Similarly, the contributory negligence of a parent of a child of tender years, is imputable to the child in an action by or for the parents. (*McCandless v. Inland N.W. Film Service, Inc.,* 64 Wn.2d 523, 392 P.2d 613 (1964)).

The Government, pursuant to the Act, may have an independent right of action, in that it may bring suit in its own name for the recovery of medical expenses, but such a suit is still derivative in that, as in the instant case, the Government would have had no obligation to pay the expenses of the minor child except and unless the

father of the child was a member of the military service. If the father or the mother of the child were negligent, this negligence should be available to the defense in an action for recovery of the medical expenses.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the Judgment of the District Court should be affirmed. In the event that the Judgment of the District Court is reversed, this cause should be remanded for trial of the liability issue on the merits with a defense of contributory negligence available to the appellee.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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